

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

NORTH JERSEY MEDIA GROUP INC.,	:	
	Plaintiff,	:
-against-		13 Civ. 7153 (ER)
	:	
FOX NEWS NETWORK, LLC,		ECF Case
	:	
	Defendant.	

-----x

NORTH JERSEY MEDIA GROUP INC.,	:	
	Plaintiff,	:
-against-		14 Civ. 7630 (ER)
	:	
FOX NEWS NETWORK, LLC,		ECF Case
	:	
	Defendant.	:

-----x

AMENDED JOINT PRETRIAL STATEMENT

In accordance with Rule 26(a)(3) of the Federal Rules of Civil Procedure and the Individual Practices of this Court, plaintiff North Jersey Media Group Inc. (“NJMG”) and defendant Fox News Network, LLC (“Fox News”) respectfully submit the following amended joint pretrial statement. This statement replaces the joint pretrial statement filed previously in this action. *See NJMG I* Dkt. No. 126; *NJMG II* Dkt. No. 134. The parties reserve the right to supplement their portions of this statement based upon (i) additional discovery received from the other party subsequent to the submission of this statement, or (ii) the outcome of the Fox News’ dispositive motion for summary judgment, which is presently *sub judice*.

(i) Caption.

The caption, or captions, of the action, or actions, is, or are, set forth above.

(ii) Trial Counsel

Trial counsel for NJMG are:

William Dunnegan
wd@dunnegan.com
Laura Scileppi
ls@dunegan.com
Richard Weiss
rw@dunnegan.com
Dunnegan & Scileppi LLC
350 Fifth Avenue, 49th Floor
New York, New York 10118
(212) 332-8300 (Phone)
(212) 332-8301 (Fax)

Trial counsel for defendant Fox News are:

Dori Ann Hanswirth
dori.hanswirth@hoganlovells.com
Nathaniel Boyer
nathaniel.boyer@hoganlovells.com
Benjamin Fleming
benjamin.fleming@hoganlovells.com
Patsy Wilson
patsy.wilson@hoganlovells.com
Hogan Lovells US LLP
875 Third Avenue
New York, New York 10022
(212) 918-3000 (Phone)
(212) 918-3100 (Fax)

(iii) Subject Matter Jurisdiction.

The Court has subject matter jurisdiction in this action pursuant to 28 U.S.C. § 1338 because NJMG's claims for copyright infringement arise under 17 U.S.C. § 101 et seq.

(iv) Claims and Defenses.

NJMG's Statement of Its Claims

NJMG is asserting two claims for copyright infringement against Fox News.

NJMG's copyrighted work is a photograph of three New York City firemen raising the American flag upon the ruins of the World Trade Center on the afternoon of September 11, 2001 (the "Photograph"). Thomas E. Franklin ("Franklin"), then an employee of NJMG, took the Photograph while acting within the scope of his employment. NJMG registered the copyright in the Photograph effective October 5, 2001, and received from the Register of Copyrights U.S. Certificate of Copyright Registration No. VA 1-014-297. Fox News infringed this copyright in the Photograph, twice, by posting a derivative work (or altered version) of the Photograph to two Facebook pages Fox News manages for the purpose of (i) promoting its television programs, and (ii) promoting commercial websites from which Fox News receives advertising revenue. The first infringement occurred on or about September 11, 2013, on the Facebook page Fox News maintained for its program "Justice with Judge Jeanine." The second infringement occurred on or about September 11, 2014, on the Facebook page Fox News maintained for its program, "Special Report with Bret Baier."

Fox News' Statement of Its Defenses

(1) Fair Use: Fox News maintains that its uses of visually altered, significantly cropped, and low-resolution versions of the Photograph on Facebook pages associated with Fox News personalities were "fair," and thus not infringements of copyright. *See* 17 U.S.C. § 107. This defense was the subject of two substantial motions for summary judgment—one of which was the subject of a 26-page opinion and order on February 10, 2015, and the other of which is *sub judice*—and can be summarized as follows. The first of the four factors weighs in Fox News' favor because its uses were for the purposes of news reporting and/or commentary; were transformative, both visually and in their purposes; and were not commercial speech. The second factor weighs in Fox News' favor because the Photograph is a previously published,

factual work. The third factor weighs in Fox News' favor because Fox News' uses were reasonable in relation to the purposes for which Fox News made the uses. The fourth factor weighs in Fox News' favor because there is no evidence that Fox News' uses have caused any harm to any legitimate market for NJMG's Photograph. These factors—coupled with other considerations, such as how Fox News' uses advance the overall goals of the Copyright Act and the dissemination of free speech—demonstrate that Fox News' uses were fair. *See* 17 U.S.C. § 107.

(2) ***De Minimis* Use.** Fox News' uses of the Photograph were *de minimis*. Almost no protectable elements of the Photograph were used. With respect to the allegedly infringing post to the Facebook page associated with Bret Baier, the timing of the comments to the post strongly suggests that Fox News' use was only fleetingly displayed. Similarly, the allegedly infringing post to the Facebook page associated with Jeanine Pirro was removed within six days of its posting, thus ensuring that Fox News' use of the image was only fleetingly displayed.

(3) **Waiver.** NJMG intentionally relinquished its right to bring copyright infringement claims against Fox News for these uses via its conduct in relation to the Photograph (by, among other things, providing Fox News with *gratis* copies of the Photograph to display on the Fox News Channel in connection with historical remembrance of September 11).

(4) **Failure to Mitigate Damages.** In June 2014, NJMG was presented with evidence that Fox News had a license to use the Photograph through the Associated Press (the “AP”), and that NJMG was entitled to a share of the \$250 sublicensing fee that Fox News paid to the AP. NJMG refused to accept the payment. In refusing to do so, NJMG failed to mitigate its damages.

(5) **The First Amendment of the United States Constitution.** NJMG is attempting to stifle Fox News' First Amendment right to freedom of speech, for the reasons stated in connection with Fox News' fair use defense.

(6) **Lack of Ownership of Copyright.** Thomas Franklin, the photojournalist who created the Photograph, did not do so in a capacity as an employee of NJMG within the meaning of the Copyright Act and applicable case law interpreting the work for hire provisions of the Copyright Act. *See* 17 U.S.C. §§ 101, 201. For this reason, NJMG does not own (and has never owned) the copyright in the Photograph, and therefore, it has no claim for copyright infringement.

(7) **License.** Fox News obtained a license to use the Photograph when Mr. Franklin appeared on the September 11, 2011 edition of *Studio B with Shepard Smith*, a *Fox News Channel* program.

(8) **Not in Public Interest / No Irreparable Harm / No Injunction.** To the extent NJMG is seeking a permanent injunction, NJMG cannot satisfy the stringent elements required to obtain an injunction. Among other reasons, NJMG cannot show that it has and would suffer “irreparable harm” as a result of Fox News’ uses of the Photograph, and it cannot show that an injunction on Fox News’ speech would be in the “public interest.” Further, with respect to one of Fox News’ alleged uses, Fox News removed it from the Facebook page.

(9) **Limited Damages.** As discussed *infra* Part (ix), should an infringement be found, any such infringement(s) were “innocent”—and certainly not “willful”—and thus, NJMG should recover no more than \$200 in statutory damages.

Claims and Defenses Previously Asserted that Are Not to Be Tried

(1) **Copyright Infringement Against Jeanine Pirro in 13 Civ. 7153.** On August 28, 2015, NJMG filed a letter with the court seeking to dismiss its claim against Ms. Pirro, with prejudice. *See* Dkt. No. 99. On September 28, 2015, the Court dismissed NJMG's claim against Ms. Pirro, with prejudice. *See* Dkt. No. 105.

(2) **Copyright Infringement Against John Does Nos. 1-5 in 14 Civ. 7630.** On June 1, 2015, NJMG filed a notice of voluntarily dismissal dropping its claim against "John Does Nos. 1-5." *See* Dkt. No. 19.

(3) **Copyright Misuse in 13 Civ. 7153.** Fox News asserted this defense in its Answer to the Amended Complaint. *See* Dkt. No. 15, Twelfth Affirmative Defense.

(4) **Fox News' Video Counterclaims in 14 Civ. 7630.** The Court has severed Fox News' counterclaims (and NJMG's associated third-party indemnification claims) from NJMG's infringement claim, which is scheduled for trial on February 16, 2016. *See* Dkt. No. 87.

(v) Jury Trial.

The case will be tried by a jury—except for NJMG's request for equitable relief and Fox News' equitable defenses ("not in public interest / no irreparable harm /no injunction"), which will be decided by the Court. The parties expect that the trial should take 3-4 days.

(vi) Consent to a Magistrate Judge.

The parties do not consent to a trial before a Magistrate Judge.

(vii) Stipulations

The parties do not stipulate to the truth of any facts.

(viii) Witnesses

NJMG's Witnesses

NJMG expects to call the following witnesses:

Jennifer Borg, Esq.
North Jersey Media Group Inc.
1 Garret Mountain Plaza
Woodland Park, New Jersey 07424

Ms. Borg will testify consistently with her deposition in this action and concerning the business of NJMG, the employment status of Mr. Franklin on September 11, 2001, the registration of the Photograph with the U.S. Copyright Office, NJMG's licensing activities, its enforcement program and the infringing activities of Fox News.

Thomas E. Franklin
Montclair State University
1 Normal Avenue,
Montclair, New Jersey 07043

Mr. Franklin will testify consistently with his deposition in this action and concerning the Photograph, including its creation on September 11, 2001.

Amre Youssef
North Jersey Media Group Inc.
1 Garret Mountain Plaza
Woodland Park, New Jersey 07424

Mr. Youssef will testify consistently with his deposition in this action and concerning NJMG's licensing of the Photograph and NJMG's licensing of NJMG content.

Georeen Tanner
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Ms. Tanner will testify concerning a variety of issues, including the posting of the Pirro Image on the Justice with Jeanine Pirro Facebook Page and the content, maintenance, and purpose of the Pirro Facebook Page.

Katy Ricalde
Fox News Network, LLC
400 North Capitol Street NW
Washington, D.C. 20001

If she testifies live at trial, Ms. Ricalde will testify concerning a variety of issues, including the posting of the Baier Image to the Special Report with Bret Baier Facebook Page and the content, maintenance, and purpose of the Baier Facebook Page.

Dianne Brandi, Esq.
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Ms. Brandi will testify concerning a variety of issues including Fox News' revenues, Fox News' policies and procedures in relation to the licensing the content of third parties, Fox News' previous licensing of the Photograph, and Jeanine Pirro's involvement in the posting of the Photograph to the Pirro Facebook Page.

Martin Finn
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Mr. Finn will testify concerning a variety of issues, including the practice of Fox News in obtaining licenses from third parties.

Jason Ehrich
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Mr. Ehrich will testify concerning a variety of issues, including Fox News' social media strategy.

Dan Cohen
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Mr. Cohen will testify concerning a variety of issues, including Fox News' purchase of a license for the Photograph for use on the "Hannity" show of Fox News on or about August 28, 2014.

Fox News' Witnesses

Fox News expects to call the following ten (10) witnesses:

Jennifer Borg, Esq.
North Jersey Media Group Inc.
1 Garret Mountain Plaza
Woodland Park, New Jersey 07424

Ms. Borg will testify concerning the business of NJMG; facts surrounding NJMG's contention that Mr. Franklin was an employee on September 11, 2001; the registration of the Photograph with the U.S. Copyright Office; NJMG's history licensing the Photograph; NJMG's cancelation of its agreement with Associated Press; and NJMG's enforcement strategy of suing alleged infringers and extracting settlements as its primary way of benefiting from its alleged copyright in the Photograph.

Dianne Brandi, Esq.
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Ms. Brandi will testify concerning Fox News' reliance on the fair use doctrine in the course of fulfilling its mission to provide news, information, and commentary; practices in

relation to licensing the content of third parties; Fox News' previous licensing of the Photograph; and NJMG's failure to mitigate its damages.

Dan Cohen
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Mr. Cohen will testify concerning Fox News' license for the Photograph for use in a Fox News program in August 2014, and licensing content from Getty Images generally.

Thomas E. Franklin
Montclair State University
1 Normal Avenue
Montclair, New Jersey 07043

Mr. Franklin will testify concerning his relationship with NJMG; the creation of the Photograph on September 11, 2001; NJMG's licensing of the Photograph; and Mr. Franklin's other experiences and actions in relation to the Photograph.

Zachary Friedman
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Mr. Friedman will testify concerning the lack of a connection between the Pirro and Baier Facebook pages, on the one hand, and internet ad sales revenue, on the other hand.

Madeline Grenadier
The Automotive Advertising Agency
706 W Ben White Blvd
Ste 202, Bldg B
Austin, Texas 78704

Ms. Grenadier will testify regarding her interactions with NJMG in connection with her September 2014 request to license the Photograph for use on a social media page.

Dominick Rossi
Fox News Network, LLC
1211 Avenue of the Americas

New York, New York 10036

Mr. Rossi will testify concerning the lack of a connection between the Pirro and Baier Facebook pages, on the one hand, and TV ad sales revenue, on the other hand.

Dr. Aram Sinnreich
American University
School of Communication
4400 Massachusetts Avenue, NW
Washington, DC 20016

Dr. Sinnreich is an expert witness and academic whose work focuses on the intersection of media, culture, law and technology. He will testify on all matters contained in his expert report, including how and why NJMG's licensing strategy prohibits the formation of a social media licensing market, and how and why Fox News' uses of modified versions of the Photograph—one being a meme, and one being a mashup—on Facebook pages were highly transformative, non-substitutional, and caused no market harm.

Georeen Tanner
Fox News Network, LLC
1211 Avenue of the Americas
New York, New York 10036

Ms. Tanner will testify concerning her background and experience; the content, maintenance, and purposes of the Facebook page associated with the *Justice with Judge Jeanine* Fox News Channel Program; and her post of an image to that Facebook page on September 11, 2013.

Amre Youssef
North Jersey Media Group Inc.
1 Garret Mountain Plaza
Woodland Park, New Jersey 07424

Mr. Youssef will testify concerning NJMG's licensing of the Photograph and NJMG's licensing of NJMG content.

(ix) Depositions.

Stipulation Regarding Deposition Designations

As of now, the parties are providing only two sets of deposition designations: (1) Katy Ricalde and (ii) Thomas E. Franklin.

All other anticipated witnesses (*see supra* Part viii) are either within the control of the parties, or reside within the subpoena power of the Court. The parties stipulate and agree that, should such a witness unexpectedly become unavailable, such unexpected unavailability would constitute good cause to amend this joint pre-trial statement to include deposition designations for that witness.

Katy Ricalde

On February 2, 2016, Plaintiff submitted the parties' designations of (i) the transcript of the deposition of Katy Ricalde taken on October 22, 2015 and (ii) the transcript of the deposition of Fox News by its designated witness, Katy Ricalde, taken on October 22, 2015. The parties respectfully refer the Court to these designated transcripts. Plaintiff objects to the highlighted text being read to the jury, for the reasons stated in its February 2, 2016 cover letter. Fox News objects to the questions and answers being read to the jury where counsel for Fox News interposed an objection on the record; those objections are in a red box in the designations. Where the text is crossed out, then neither party would like that portion of the transcript read to the jury.

Tom Franklin

Fox News: Fox News intends to rely upon the following portions of the deposition of Tom Franklin taken on July 10, 2014, if Mr. Franklin does not testify live at trial.

8:4 – 8:6
9:16 – 10:4

11:6 – 11:16
13:2 – 13:23
18:7 – 18:14
19:10 – 20:8
21:10 – 21:19
21:25 – 22:6
22:16 – 22:20
22:23 – 23:6
23:17 – 24:19
25:7 – 26:11
26:19 – 27:11
27:14 – 27:18
29:10 – 31:8
31:24–32:2
32:5
39:20 – 39:24
40:20 – 41:2
41:20 – 42:8
42:19 – 42:25
43:9 – 43:16
43:20 – 44:3
45:6 – 45:19
48:11 – 48:19
57:13 – 57:21
58:2 – 58:5
58:11 – 59:20
59:22 – 60:12
60:14
61:7 – 61:21
63:5 – 64:10
64:12 – 64:19
64:21 – 65:13
65:15 – 65:17
78:18 – 78:24
79:20 – 80:11
81:10 – 82:7
82:11 – 83:2
83:12 – 84:3
84:9 – 84:11
84:16 – 84:19
84:23 – 84:25
85:4 – 85:14
86:21 – 86:23
87:9 – 87:12
88:11 – 89:5
89:13 – 89:25

90:6 – 90:8
90:11
90:16 – 90:18
90:20
90:24 – 91:3
91:5 – 91:21
92:13 – 93:11
96:3 – 96:25
97:18 – 98:12
98:15 – 98:17
98:19 – 98:20
98:22 – 98:25
100:3 – 100:12

NJMG: NJMG reserves its right to object to any of the testimony that Fox News proposes to read and counter-designates the following passages.

8:7-16
14:5-15:7
20:9-21:9
21:20-24
22:7-15
23:12-16
24:20-25:6
36:5-25
39:25-40:16
44:17-45:5
46:5-47:20
58:6-10
60:15-23
61:2-6
61:22-63:4
65:19-66:23
76:10-24
78:25-79:6
83:3-11
91:22-92:12

(x) Exhibits.

NJMG's Exhibits: NJMG intends to offer into evidence the exhibits listed on Schedule A and intends to offer the exhibits listed on Schedule B if the need arises. The listing of any exhibit is not intended to be an admission that any exhibit would be admissible if offered by Fox

News. Per the Court's Individual Practices, Fox News has identified on Schedule A and Schedule B whether it agrees that the exhibits are authentic and/or admissible.

Fox News' Exhibits: Fox News intends to offer into evidence the exhibits listed on Schedule C and intends to offer the exhibits listed on Schedule D if the need arises. Per the Court's Individual Practices, NJMG has identified on Schedule C and Schedule D whether it agrees that the exhibits are authentic and/or admissible.

(xi) Damages.

NJMG Statement

NJMG seeks statutory damages pursuant to 17 U.S.C. § 504(c). Statutory damages pursuant to this section are awarded in the discretion of the trier of fact, in this case the jury, and are not subject to calculation or computation except within the statutory limits.

In this case, that range of statutory damages is (i) between \$750 and \$150,000 for Fox News' infringement of the Photograph in the action North Jersey Media Group Inc. v. Fox News Network, LLC, 13 Civ. 7153, and (ii) between \$750 and \$150,000 for Fox News' infringement of the Photograph in the action North Jersey Media Group Inc. v. Fox News Network, LLC, 14 Civ. 7630. Thus, the total amount of damages that the jury may award against Fox News in total ranges between \$1,500 and \$300,000. The facts of this case should not allow Fox News to reach the jury on an "innocent infringer" defense pursuant to 17 U.S.C. § 504(c). The fact that these two actions are being tried together does not impact NJMG's right to recover in each action.

The amount that the jury should award within these ranges depends in part on whether the infringements of Fox News were "willful" within the meaning of the statute, \$30,000 for each action being the maximum if the infringement in each action was not willful. This state of mind of "willfulness" includes states of mind known as "recklessness" and "willful blindness."

Fox News Statement

Fox News is seeking no damages in connection with the claims scheduled for trial on February 16, 2016. However, it reserves the right to seek to recover its reasonable costs, including attorneys' fees, at the appropriate time. Similarly, Jeanine Pirro—a "prevailing party" in Case No. 13-cv-7153, as NJMG voluntarily dismissed its claims against her, with prejudice—reserves her right to seek her reasonable costs, including attorneys' fees, at the appropriate time.

As for NJMG's damages, Fox News disputes NJMG's statement in three regards. **First**, Fox News disputes liability, and on that basis disputes that NJMG is entitled to statutory damages at all. **Second**, under 17 U.S.C. § 504, NJMG is entitled to a single award of statutory damages for the "all infringements" of the "one work" at issue in this consolidated action. NJMG is not entitled to an award of statutory damages for each of the two alleged infringements, as it states above. This is the subject of a motion *in limine* that Fox News made on January 11, 2016. *See NJMG I* Dkt No. 137; *NJMG II* Dkt. No. 146. **Third** and lastly, NJMG misstates the range of statutory damages available under 17 U.S.C. § 504. The range of statutory damages for infringement is, generally, \$750 to \$30,000. *See* 17 U.S.C. § 504(c)(1). That award can be increased to \$150,000 if the jury finds that the infringement was "committed willfully." *See* 17 U.S.C. § 504(c)(2). It can also be decreased to \$200 if the jury finds that the Fox News "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright"; which is commonly referred to as "innocent infringement." *Id.* Thus, the overall range of available statutory damages is \$200 to \$150,000, not \$1,500 to \$300,000 as NJMG sets forth above.

(xii) Verdict.

The parties do not consent to less than a unanimous verdict.

Dated: New York, New York
February 10, 2016

DUNNEGAN & SCILEPPI LLC

By s/William Dunnegan
William Dunnegan (WD0415)
wd@dunnegan.com
Richard Weiss (RW4039)
rw@dunnegan.com
Attorneys for Plaintiff
North Jersey Media Group Inc.
350 Fifth Avenue
New York, New York 10118
(212) 332-8300

HOGAN LOVELLS US LLP

By /s/ Dori Ann Hanswirth
Dori Ann Hanswirth
dori.hanswirth@hoganlovells.com
Nathaniel Boyer
nathaniel.boyer@hoganlovells.com
Benjamin Fleming
benjamin.fleming@hoganlovells.com
Patsy Wilson
patsy.wilson@hoganlovells.com
Attorneys for Defendant
Fox News Network, LLC
875 Third Avenue
New York, New York 10022
(212) 918-3000